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10  
11 IN THE UNITED STATES DISTRICT COURT  
12 NORTHERN DISTRICT OF CALIFORNIA  
13 SAN FRANCISCO DIVISION

14 STANLEY D. CANNON and PATRICIA R.  
15 CANNON, individually, and for other persons  
16 similarly situated,

17 Plaintiffs,

18 vs.

19 WELLS FARGO BANK, N.A., FEDERAL  
20 NATIONAL MORTGAGE ASSOCIATION,  
21 and ASSURANT, INC.

22 Defendants.

Case No. CV-12-01376 EMC

**PLAINTIFF'S AMENDED OPPOSITION TO  
WELLS FARGO BANK, N.A.'S MOTION (a)  
TO DISMISS PLAINTIFFS' FIRST  
AMENDED CLASS ACTION COMPLAINT  
AND (b) TO DISMISS OR STRIKE  
PLAINTIFFS' JURY DEMAND**

Date: November 30, 2012

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Action Filed: March 19, 2012

Trial Date: None Set

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1 **I. INTRODUCTION**

2 Wells Fargo Bank, N.A. is Plaintiffs' mortgage servicer. It entered into a collusive  
 3 arrangement with Assurant, Inc. and its subsidiaries to reap substantial profits at the expense of  
 4 consumers. Under this agreement, Wells Fargo Bank, N.A. ("Wells Fargo") agreed to purchase every  
 5 force-placed insurance policy for every mortgage it serviced from Assurant, Inc. ("Assurant") and its  
 6 subsidiaries. FAC ¶¶ 3, 48. In exchange, Assurant agreed to pay a "commission" to Wells Fargo  
 7 despite the fact that Wells Fargo did nothing to earn this commission. FAC ¶ 3. Wells Fargo then  
 8 required borrowers to maintain "replacement cost value" flood insurance coverage regardless of the  
 9 borrower's loan balance. FAC ¶ 7. If a borrower refused to purchase the demanded insurance, Wells  
 10 Fargo force-placed insurance on their property. FAC ¶ 7. Wells Fargo's excessive insurance  
 11 requirements increased the quantity of force-placed policies and the number, and amount of,  
 12 commissions it received. FAC ¶ 52. These actions breached Plaintiffs' and class members mortgage  
 13 contracts and the covenant of good faith and fair dealing, violated federal statutes, and trampled  
 14 Plaintiffs' rights under California's common law and equitable principles.

15 Wells Fargo Bank's motion to dismiss rehashes numerous arguments that it and other loan  
 16 servicers have raised and lost in cases with very similar facts. *Abels v. JPMorgan Chase Bank, N.A.*,  
 17 678 F. Supp. 2d 1273 (S.D. Fla. 2009), was the first court to address these issues, and the court  
 18 rejected similar defenses. Since then, the vast majority of federal district courts addressing claims  
 19 involving the same facts alleged here have upheld such claims. Wells Fargo relies heavily on two  
 20 Massachusetts District Court decisions that dismissed similar claims. However, the First Circuit  
 21 Court of Appeals recently vacated both of these decisions and reinstated all claims in the first  
 22 appellate decisions addressing claims about mortgage servicers' collusive schemes with force-placed  
 23 insurers. *Lass v. Bank of America*, 2012 WL 4240504 (1st Cir. Sep. 21, 2012); *Kolbe v. Bank of*

America, 2012 WL 4240298 (1st Cir. Sep. 21, 2012).

Two years ago, Judge Alsup of this District denied a motion to dismiss similar claims in *Hofstetter v. JPMorgan Chase Bank, N.A.*, 751 F. Supp. 2d 1116 (N.D. Cal. 2010). Judge Spero, also from this District, refused to dismiss similar claims in *McNeary-Calloway v. JPMorgan Chase Bank, N.A.*, 2012 WL 1029502 (N.D. Cal. Mar. 26, 2012). Judge Mendez of the Eastern District of California ruled likewise. *Gooden v. Suntrust Mortgage*, 2012 WL 996513 (E.D. Cal. Mar. 23, 2012). Courts across the country have followed suit.<sup>1</sup> In *Williams v. Wells Fargo.*, 2011 WL 4901346 (S.D. Fla. Oct 14, 2011), the Court certified a class based on similar claims after denying Wells Fargo's motion to dismiss. This Court should follow the overwhelming trend of federal courts in this District and throughout the country and deny Wells Fargo's Motion to Dismiss in its entirety. If the Court grants the motion in whole or in part, Plaintiffs request leave to amend their Complaint.

## II. LEGAL ARGUMENT

### A. Preliminary Legal Issues

#### 1. Legal Standard

A motion to dismiss pursuant to Rule 12(b)(6) tests the sufficiency of the complaint. *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957). “Generally, a plaintiffs’ burden at the pleading stage is relatively light. Rule 8(a) of the Federal Rules of Civil Procedure states that “[a] pleading which sets for a claim for relief . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief.”” *McNeary-Calloway, supra*, at \*15 (citing Fed. R. Civ. P. 8(a)). This standard “simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of” the necessary element.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). The

<sup>1</sup> See, e.g., *Gordon v. Chase Home Fin., LLC, et al.*, 2012 WL 750608 (M.D. Fla. Mar. 7, 2012); *Wulf v. Bank of Am.*, 798 F. Supp. 2d 586 (W.D. Pa. 2011); *Walls v. JPMorgan Chase Bank, N.A., et al.*, 2012 WL 309660 (W.D. Ky. July 30, 2012); *Morris v. Wells Fargo Bank, N.A.*, 2012 WL 392805 (W.D. Pa. Sep. 7, 2012); *Kunzelman v. Wells Fargo Bank, N.A.*, 2012 WL 2003337 (S.D. Fla. June 4, 2012); *Skansgaard v. Bank of America, N.A., et al.*, 2011 WL 9169945 (W.D. Wash. Oct. 13, 2011); *Arnett v. Bank of America, N.A., et al.*, 2012 WL 2848425 (D. Or. Jul 11, 2012).

1 Court must view the complaint in the light most favorable to the Plaintiff. *Parks Sch. of Bus. v.*  
 2 *Symington*, 51 F.3d 1480, 1484 (9th Cir. 1994). The plaintiff must merely plead sufficient facts to  
 3 “nudge [the] claims across the line from conceivable to plausible.” *Twombly*, 550 U.S. at 570.

## 4 **2. Applicable Law**

5 Plaintiffs’ mortgage contains a forum selection clause stating that “[t]his Security Instrument  
 6 shall be governed by federal law and the law of the jurisdiction in which the Property is located.”  
 7 Mortgage ¶ 16. For this reason, Plaintiffs’ breach of contract and the implied covenant of good faith  
 8 and fair dealing claims are subject to Florida law. Plaintiffs’ other state-law claims—unjust  
 9 enrichment, conversion, and breach of fiduciary duty—are not subject to the forum selection clause  
 10 in their mortgage. Thus, Plaintiffs raise these claims under the laws of California.

11 The choice of law clause in Plaintiffs’ mortgage does not apply to Plaintiffs’ common law tort  
 12 and equitable claims. The choice-of-law provision in Plaintiffs’ mortgage specifically applies only to  
 13 “[t]his Security Instrument.” Mortgage ¶ 16. “A choice of law provision that relates only to the  
 14 agreement will not encompass related tort claims.” *Cooper v. Meridian Yachts, Ltd.*, 575 F. 3d 1151,  
 15 1162 (11th Cir. 2009). As such, the choice-of-law provision applies only to Plaintiffs’ contract based  
 16 claims. Plaintiffs may bring their state law claims under California law.

17 California “may constitutionally exercise jurisdiction over the claims of nonresident plaintiffs  
 18 in a nationwide class action case” as long as California has “significant contact or aggregation of  
 19 contacts to the claims asserted by each member of the plaintiff class . . . to ensure that the choice of  
 20 forum law is not arbitrary or unfair.” *Clothesrigger, Inc. v. GTE Corp.*, 191 Cal. App. 3d 605, 612–  
 21 613 (1987)(quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821–22 (1985)). “[A] California  
 22 court may properly apply California laws to non-California members of a nationwide class where the  
 23 defendant is a California corporation and some or all of the challenged conduct emanates from  
 24  
 25  
 26  
 27  
 28

California.” *Wershba v. Apple Comp., Inc.*, 91 Cal. App. 4th 224, 243 (2001). Non-residents are barred from bringing suit under California law only where the alleged misconduct “simply has no connection to California.” *Gross v. Symantec Corp.*, 2012 WL 3116158, \*6 (N.D. Cal. July 31, 2012)(quoting *Sajfr v. BBG Commc’ns, Inc.*, 2012 WL 398991, at \*4 (S.D. Cal. Jan.10, 2012).

Wells Fargo maintains its principal office in San Francisco, California. FAC ¶¶ 14, 17. It is reasonable to infer that each act predicated Plaintiffs’ claims originated in California. As such, Defendants’ business practices are subject to the laws of the State of California. Additionally, Plaintiffs have raised national and state law class action allegations, including claims on behalf of California residents. *See, e.g.*, FAC ¶ 74. In *Parkinson v. Hyundai Motor Am.*, 258 F.R.D. 580 (C.D. Cal. 2008), the Court allowed a nonresident plaintiff to bring California UCL claims because the “defendant’s relevant operations, including its headquarters . . . are located in California.” *Id.* Additionally, “many of the alleged wrongful acts emanated from the defendant’s . . . offices in . . . California.” *Id.* at 598; *see also, In re Countrywide Fin. Corp. Mortg. Marketing and Sales Practices Litig.*, 2011 WL 4809881, at \*3 (S.D. Cal. Oct. 11, 2011)(denying summary judgment because defendants failed to show that “all of the conduct at issue in this case occurred outside California.”)(emphasis added). The *In re Countrwide* court noted that “Defendants focus on conduct specific to the [plaintiffs’] loan, but do not address Plaintiffs’ broader allegations concerning Defendants’ alleged scheme.” This case is very similar. Defendants do not aver that their collusive dealing arrangements and decisions regarding required insurance amounts occurred outside the state of California, but instead argue that Florida law should apply. Wells Fargo’s argument ignores the fact that a substantial amount of the wrongful conduct alleged occurred in California and a substantial number of class members reside and, and were injured in, California.

**B. Wells Fargo, Acting as Servicer for Fannie Mae, Breached Plaintiffs’ Mortgage**

# 1                    1.        Wells Fargo Breached the Express Terms of Plaintiffs' Mortgage

2                Wells Fargo's actions pursuant to Section 5 of Plaintiffs' mortgage constitute a breach of the  
3 mortgage contract.<sup>2</sup> Plaintiffs' mortgage provides that "Borrower shall keep the improvements now  
4 existing or hereafter erected on the property insured against loss by . . . floods . . . in the amounts . . .  
5 and for the periods that Lender requires." Mortgage ¶ 5. The mortgage also states that "[i]f Borrower  
6 fails to maintain . . . coverage . . . Lender may obtain insurance coverage, at Lender's option and  
7 Borrower's expense" and that "such coverage shall cover Lender." The mortgage warns that "the cost  
8 of the insurance coverage so obtained might significantly exceed the cost of insurance that Borrower  
9 could have obtained." *Id.* Wells Fargo breached Plaintiffs' mortgage when it (1) charged Plaintiffs  
10 for high-cost force-placed insurance in amounts greater than that necessary to "cover" Wells Fargo or  
11 Fannie Mae's interests; (2) charged Plaintiffs for the "cost" of force-placed insurance when a portion  
12 of this "cost" was returned to Wells Fargo as a kickback; and (3) charged Plaintiffs for backdated  
13 force-placed insurance. FAC ¶¶ 89–93.

14                To state a claim for breach of contract, the plaintiff must allege: "(1) a valid contract; (2) a  
15 material breach; and (3) damages." *J.J. Gumberg Co. v. Janis Servs., Inc.*, 847 So.2d 1048, 1049 (Fla.  
16 4th Dist. Ct. App. 2003).<sup>3</sup> "As long established by the Florida Supreme Court, 'What will constitute a  
17 breach of contract is a matter of law to be determined by the court. Whether or not that has occurred  
18 which would constitute a breach of contract is a matter of fact to be determined by a jury.'" *Action*  
19 *Nissan, Inc. v. Hyundai Motor Am.*, 617 F. Supp. 2d 1177, 1195 (M.D. Fla. 2008)(quoting *Winter*  
20 *Garden Citrus Growers' Ass'n v. Willits*, 151 So. 509, 511 (1934)). In determining what constitutes a  
21 breach, "[t]he language used in a contract is the best evidence of the intent and meaning of the  
22

23  
24  
25  
26 <sup>2</sup> Plaintiffs believe that their contract is actually with Fannie Mae. However, to the extent that Plaintiffs and Wells Fargo  
27 have a contractual relationship, Plaintiffs allege that Wells Fargo breached the mortgage contract. FAC ¶¶ 86–87.

28 <sup>3</sup> Plaintiffs' breach of contract and the implied covenant of good faith and fair dealing claims are subject to the forum  
selection clause in their mortgage and thus arise under Florida law.

parties.” *Jenne v. Church & Tower, Inc.*, 814 So.2d 522, 524 (Fla. 4th Dist. Ct. App. 2002).

Wells Fargo incorrectly argues that the mortgage contract unambiguously grants it unfettered discretion to change flood insurance requirements at its every whim. *See* Mot. to Dismiss 9. Wells Fargo’s argument relies on the District of Massachusetts decision in *Lass v. Bank of America*, 2011 WL 3567280 (D. Mass. 2011), which has been vacated. *Lass* involved claims against Bank of America arising out of the same Fannie Mae mortgage contract language at issue here. The United States Court of Appeals for the First Circuit reversed the District Court decision and reinstated all claims, including breach of contract and the covenant of good faith and fair dealing, unjust enrichment, and breach of fiduciary duty. *Lass*, 2012 WL 4240504. Construing identical Fannie Mae mortgage language, the Court held that the mortgage did not unambiguously give the bank discretion to change flood insurance requirements especially when considering the flood insurance notification that accompanied the mortgage at closing. *Id.* at \*4.

Plaintiffs’ mortgage does not authorize Wells Fargo to charge borrowers excessive costs for force-placed insurance that include kickbacks returned to Wells Fargo. Plaintiffs’ mortgage states that “the cost of [force-placed insurance] . . . might significantly exceed the cost of insurance that the borrower could have obtained.” Mortgage ¶ 5. However, a portion of the “cost” that Wells Fargo charged for force-placed insurance was returned to Wells Fargo or its affiliates pursuant to secret agreements. FAC ¶ 90. Kickbacks are not “costs.” Plaintiffs’ mortgage contains no reference to commissions paid to Wells Fargo or its affiliates. “Nothing in the contract necessarily authorizes charges regardless of amount and regardless of whether Defendants receive a portion of the premiums.” *McNeary-Calloway*, *supra*, at \*23.<sup>4</sup> This is especially true when the force-placed insurance scheme is prearranged and the bank does nothing to earn the so-called “commissions.”

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<sup>4</sup> *McNeary-Calloway* is a case alleging similar claims based on force-placed hazard insurance. The contract language at issue is the nearly identical to the language in the Cannon’s mortgage.

Although Plaintiffs' mortgage requires flood insurance "in the amounts . . . and for the periods that Lender requires," the mortgage does not give Wells Fargo unlimited discretion. Plaintiffs' mortgage states that any force-placed flood insurance "shall cover Lender" and that "Lender may do and pay for whatever is *reasonable and appropriate* to protect Lender's interest in the Property." Mortgage ¶¶ 5, 9. "A force-placed policy allows the lender to protect its exposure on a property." *Williams v. Certain Underwriters at Lloyd's of London*, 398 F. App'x 44, 45 (5th Cir. 2010). Insurance equal to the outstanding loan balance is the amount necessary to "cover Lender" and "to protect the Lender's interest in the property." Anything more is unreasonable and inappropriate.

Plaintiffs received a "Notice of Special Flood Hazard" (NSFH) at closing, which specified that "[a]t a minimum, flood insurance purchased must cover the lesser of: 1. The outstanding principal balance of the loan; or 2. The maximum amount of coverage allowed for the type of property under the NFIP." *See* NSFH.<sup>5</sup> The NSFH also states two separate times that "[t]he flood insurance must be maintained for the life of the loan." Construing language identical to that in Plaintiffs' NSFH, the United States First Circuit Court of Appeals in *Lass* held that:

Paragraph 5 of the mortgage gives the Lender discretion to fix the amount of flood insurance, and the Notification was an essential part of the transaction because it represented the exercise of that discretion at the outset of the mortgage period. In effect, the Notification completed the contract between the parties by specifying that . . . Lass was obliged to obtain the amount of flood insurance required by federal law, and no more.

*Lass, supra*, at \*4.<sup>6</sup> "[T]he Notification does not identify the specified amount as merely a mandatory minimum, and it says nothing about the lender's discretion to change the insurance amount at any point." *Id.* at \*5. The First Circuit rejected the argument that replacement value coverage is

<sup>5</sup> Wells Fargo requested the Court take judicial notice of this document as Plaintiffs discussed its contents in the FAC. *See* Doc. No. 58, Exhibit I. Plaintiffs did not object to this Request and thus refer to the document here. *See* Doc. No. 65.

<sup>6</sup> The *Lass* plaintiff's situation is similar to the *Cannons*' in this case. The mortgage was originated by a different bank, and then the defendant bank subsequently acquired the mortgage and changed the plaintiff's flood insurance requirements to an amount exceeding outstanding loan balance, when loan balance coverage was sufficient before.

1 authorized because various federal agencies *recommend* such coverage, stating that that “the NFIA  
 2 appears to have incorporated the view that it also would be reasonable for mortgagees to require only  
 3 an amount ‘equal to the outstanding principal balance of the loan.’” *Id.* at \*5 (citing 42 U.S.C. §  
 4 4012a(b)(1); *see also*, *Hofstetter*, 751 F. Supp. 2d at 1127 n.3 (“Simply because an agency  
 5 recommends that lenders maintain a certain amount of flood insurance coverage does not mean that  
 6 lenders have *carte blanche* to do so without regard to the terms of their loan agreements with  
 7 borrowers.”) This Court should do the same.

## 9                   **2. Wells Fargo Breached the Implied Covenant of Good Faith and Fair** 10                   **Dealing.**

11           The implied covenant is part of every contract and it attaches to the performance of the  
 12 contract’s express terms. *Centurion Air Cargo v. UPS Co.*, 420 F.3d 1146, 1151 (11th Cir. 2005).  
 13 The purpose of the implied covenant is “to protect the contracting parties’ reasonable expectations.”  
 14 *Cox v. CSX Intermodal, Inc.*, 732 So.2d 1092, 1097 (Fla. 1st Dist. Ct. App. 1999). “[W]here the terms  
 15 of the contract afford a party substantial discretion to promote that party’s self-interest, the duty to act  
 16 in good faith . . . limits that party’s ability to act capriciously to contravene the reasonable  
 17 expectations of the other party.” *Id.* at 1098. One party cannot act capriciously in a way that harms  
 18 the other party. *Cibran v. BP Prods. of N. Am., Inc.*, 375 F. Supp. 2d 1355, 1360 (S.D. Fla. 2005).

19           Plaintiffs’ mortgage gives Wells Fargo discretion to force-place flood insurance to “cover” its  
 20 own interests. The mortgage does not authorize self-dealing. *See Cox*, 732 So.2d at 1098. Because the  
 21 contract is silent regarding the bounds of Wells Fargo’s discretion, the covenant of good faith and fair  
 22 dealing is used as a “gap-filling” tool. *See Green v. FedEx Nat’l, LTL, Inc.*, 2011 WL 6813458, at \*5  
 23 (M.D. Fla. Dec. 28. 2011). The implied covenant applies when “conduct is undertaken pursuant to a  
 24 grant of discretion and the scope of that discretion has not been designated.” *Id.* (quoting *Shibata v.*  
 25 *Lim*, 133 F. Supp. 2d 1311, 1318 (M.D. Fla. 2000)).

Wells Fargo acted capriciously and in bad faith when it exercised its discretion under Plaintiffs' mortgage. Although Section 5 permits Wells Fargo to force-place flood insurance, the mortgage does not permit Wells Fargo to act capriciously, thereby harming Plaintiffs and Class Members. FAC ¶¶ 98–99. Wells Fargo engaged in self-dealing and profiteering, whereby, pursuant to a secret contract with ASIC, it charged borrowers for “costs” that were later returned to Wells Fargo as a kickback. FAC ¶ 96–97. Due to the exclusive contract with ASIC, Wells Fargo performed no services to earn this so-called “commission.” FAC ¶ 97. Nowhere does Plaintiffs' mortgage disclose that Wells Fargo will reap a profit by procuring force-placed flood insurance pursuant to its contractual arrangements with ASIC. *See* Mortgage ¶ 5. No reasonable borrower would expect that the “cost” would be up to ten times more expensive due to Wells Fargo's self-dealing.

Wells Fargo further breached the implied covenant of good faith and fair dealing when it required that Plaintiffs and Class Members carry excessive flood insurance. FAC ¶ 96–97. Plaintiffs' mortgage states that force-placed insurance will “cover Lender.” Mortgage ¶ 5. Wells Fargo's interest in any particular mortgage is limited to the outstanding loan balance. Thus, flood insurance equal to outstanding loan balance will “cover” Wells Fargo's interests. In fact, the NSFH attached to Plaintiffs' mortgage stated that coverage equal to outstanding loan balance is sufficient under the mortgage. *See* NSFH. Wells Fargo acted unreasonably and in contravention of Plaintiffs' reasonable expectations when it force-placed flood insurance in amount far exceeding outstanding loan balance.

Abuse of power to specify terms in a contract is an exercise of bad faith that violates the duty of good faith. *Temple Univ. Hosp., Inc. v. Group Health, Inc.*, 2006 WL 146426, at \*5 (E.D. Pa. Jan. 12, 2006). “Undisclosed, inflated charges . . . may be an abuse of power to specify terms.” *Id.* “A borrower of money, especially the owner of a residential property mortgaged to a lending institution, may reasonably expect that he or she will receive fair and above-board treatment in their dealings and

1 that no undue advantage will be taken by the lender.” *In re Smith*, 866 F.2d 576, 584 (3d Cir. 1989).  
2 “[I]mposing additional and unnecessary costs and expenses” on a borrower is an “unfair” practice  
3 that violates the duty of good faith and fair dealing. *Id.* at 584–85.

4 Several courts have recently refused to dismiss breach of implied covenant of good faith and  
5 fair dealing claims based on the same issues pled here. *See Williams, supra* (“Plaintiffs’ allegations  
6 that Wells Fargo Bank . . . acted in bad faith in contravention of Plaintiffs’ reasonable expectations  
7 under those contracts sufficiently allege a claim for breach of the implied covenant”); *Abels*, 678 F.  
8 Supp. 2d 1273 (“the failure to perform a discretionary act in good faith may be a breach of the  
9 implied covenant of good faith and fair dealing”); *Hofstetter*, 751 F. Supp. 2d at 1127 (holding that  
10 nearly identical mortgage language did not give unlimited discretion to demand more insurance than  
11 was necessary to protect the lender’s interests). Just this year, Judge Spero of this District, in  
12 *McNeary-Calloway, supra*, held that “the implied covenant governs Defendants’ discretion in force-  
13 placing insurance” because the authority to force-place insurance with “unreasonably high premiums  
14 in order to facilitate kickbacks” was “not expressly bargained for in the contract.” *Id.* at 24–25.

15 On September 21, 2012, the United States Court of Appeals for the First Circuit addressed  
16 claims similar to those pled here and reversed the dismissal of two separate actions related to Bank of  
17 America’s force-placed insurance scheme. *See Lass, supra; Kolbe, supra*. The *Lass* Court addressed a  
18 Fannie Mae mortgage and held that “[e]vidence that the defendant acted to gain an advantage for  
19 itself can support a claim for breach of the implied covenant.” *Lass, supra*, at \*6; *see also, Kolbe,*  
20 *supra*, at \*9 (“a decision to demand additional insurance for the purpose of generating business for its  
21 affiliated insurance companies, and thereby increase Bank profits, would reflect the improper motive  
22  
23  
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necessary to demonstrate a breach of the covenant of good faith and fair dealing.”)<sup>7</sup>

**C. Wells Fargo Was Unjustly Enriched at Plaintiffs’ Expense**

Wells Fargo was unjustly enriched when it earned a hidden profit through its force-placed insurance schemes. Wells Fargo and Assurant devised a scheme whereby Assurant charged excessive premiums, and then paid “commissions” to Wells Fargo. FAC ¶ 102. Wells Fargo and its affiliates received a benefit in the form of kickbacks from the excessive and unreasonable insurance premiums. It would be unjust to allow Wells Fargo to retain these hidden profits. FAC ¶ 107.

“The elements of an unjust enrichment claim are the receipt of a benefit and [the] unjust retention of the benefit at the expense of another. *Peterson v. Cellco P’ship*, 164 Cal. App. 4th 1583, 1593 (2008). “A person is enriched if he or she receives a benefit at another’s expense. The term “benefit” connotes *any* type of advantage.” *Hirsch v. Bank of Am.*, 107 Cal. App. 4th 708, 721–22, (2003)(quoting Restatement, Restitution, § 1, cmt. a–b, p. 12.<sup>8</sup> Plaintiffs and class members conferred a benefit on Wells Fargo when they paid for the kickbacks returned to Wells Fargo. FAC ¶ 102. Wells Fargo should be required to return the unearned kickbacks.

Wells Fargo incorrectly argues that Plaintiffs’ unjust enrichment claim is barred because an express contract governs the issues in this case. *See* Wells Fargo’s Mot. to Dismiss 19. At this juncture, Plaintiffs are unsure whether they even have a contractual relationship with Wells Fargo. FAC ¶ 101. Plaintiffs agree that a claim for unjust enrichment “does not lie when an enforceable, binding agreement exists defining the rights of the parties.” *Paracor Fin., Inc. v. Gen. Elec. Capital Corp.*, 96 F.3d 1151, 1167 (9th Cir. 1996). However, an unjust enrichment claim is only precluded by

<sup>7</sup> The *Kolbe* court refers to improper motive as an element of an implied covenant of good faith and fair dealing claim. While improper motive is not required under Florida law, *Kolbe* underscores the fact that the lower threshold under Florida law is easily met.

<sup>8</sup> Florida law is nearly identical to California law for unjust enrichment claims. *See Hillman Const. Corp. v. Wainer*, 636 So.2d 576, 577 (Fla. 4th Dist. App. 1994). Thus, Plaintiffs’ unjust enrichment claim is the same under Florida law.

1 the existence of an express contract if the parties' rights "are squarely set out in the [contract]." *Id.*  
 2 Plaintiffs "never borrowed any money from Wells Fargo, and Wells Fargo represented to Plaintiffs  
 3 that it was the servicer—not owner—of their mortgage and that Fannie Mae owns Plaintiffs'  
 4 mortgage contract." FAC ¶ 101. This allegation clearly raises the issue that no contract may exist that  
 5 governs Wells Fargo's actions with respect to force-placed insurance.  
 6

7 Even if Plaintiffs have a contract with Wells Fargo, the mortgage did not authorize Wells  
 8 Fargo to require excessive flood insurance, to receive kickbacks, or to charge borrowers for such  
 9 kickbacks. FAC ¶ 101. The First Circuit in *Lass*, addressing identical mortgage language, held that  
 10 the plaintiff could proceed with an unjust enrichment claim even in light of the mortgage contract  
 11 because "[t]he mortgage . . . does not explicitly address commissions or, more generally, the Bank's  
 12 entitlement to profit from its force placement of insurance." *Lass, supra*, at \*8.<sup>9</sup>  
 13

14 Wells Fargo was unjustly enriched by the portion of the force-placed insurance premiums that  
 15 Assurant returned to Wells Fargo as kickbacks. FAC ¶ 102. Wells Fargo incorrectly argues that "the  
 16 Cannons do not allege facts showing that any enrichment is 'unjust.'" Mot. to Dismiss 20. "If the  
 17 mortgage did not permit the Bank to force place insurance in an amount greater than the amount of  
 18 [the] loan, the Bank's decision to do so—with attendant benefit to itself—would seem to fit any  
 19 notion of 'unjust.'" *Lass, supra*, at \*9. This Court should follow *Lass* and the other federal decisions  
 20 on this issue and hold likewise. *See also, Abels*, 678 F. Supp. 2d 1273; *Williams, supra*.  
 21

#### 22 **D. Wells Fargo Converted Plaintiffs' Property**

23 "Conversion is the wrongful exercise of dominion over the property of another." *Mendoza v.*  
 24 *Continental Sales Co.*, 140 Cal. App. 4th 1395, 1404–05 (2006). "The elements of a conversion  
 25

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26 <sup>9</sup> Rule 8(d)(2) expressly allows alternative pleading. *See* Fed. R. Civ. P. 8(d)(2); *Pinel v. Aurora Loan Servs., LLC*, 814 F.  
 27 Supp. 2d 930, 944 (N.D. Cal. 2011)("[A]t the pleading stage, a plaintiff is entitled to plead inconsistent causes of  
 28 action."); *Lass, supra*, at \*8 ("it is accepted practice to pursue both theories at the pleading stage.")

claim are: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages.” *Id.* “[T]he act of conversion itself is tortious. Therefore, questions of the defendant's good faith, lack of knowledge, and motive are ordinarily immaterial.” *Id.*<sup>10</sup> Wells Fargo committed the tort of conversion when it improperly exercised control of Plaintiffs’ and class members’ property by imposing improper kickbacks and charges on borrowers’ escrow accounts and collecting those kickbacks.

Wells Fargo incorrectly argues that the Cannons “consented to and authorized Wells Fargo’s alleged conduct,” and thus their conversion claim cannot lie. *See* Mot. to Dismiss 21. First, Plaintiffs and Wells Fargo may well not even have a contractual relationship. FAC ¶ 111. Second, Plaintiffs did not authorize Wells Fargo’s “alleged conduct.” At the very most, Plaintiffs’ mortgage provides that Wells Fargo may open an escrow account and pay insurance costs from this account. Plaintiffs’ mortgage never mentions, much less authorizes, Wells Fargo to enter into secret agreements with Assurant, whereby all force-placed insurance policies are purchased from the same company, at anti-competitive prices, so that Wells Fargo can receive a pre-determined kickback. FAC ¶ 111.

The economic loss doctrine does not preclude Plaintiffs’ conversion claim here. “Under California law, the economic loss doctrine bars tort claims based on the same facts and damages as breach of contract claims.” *Alvarado Orthopedic Research, L.P. v. Linvatec Corp.*, 2011 WL 3703192 (S.D. Cal. Aug. 23, 2011). “The doctrine precludes recovery for ‘purely economic loss due to disappointed expectations,’ unless the plaintiff ‘can demonstrate harm above and beyond a broken contractual promise.” *Id.* (internal citations omitted).<sup>11</sup> This argument fails for the same reasons as

<sup>10</sup> Florida law regarding conversion is nearly identical. *See Senfeld v. Bank of Nova Scotia Trust Co.*, 450 So.2d 1157, 1160–61 (Fla. 3d Dist. App. 1984).

<sup>11</sup> The economic loss rule would also not apply under Florida law. “[W]here there is a possibility that the Defendant's actions were outside the scope of the agreement, an action in conversion is not barred by the economic loss doctrine.” *Fla. Dept. Ins. v. Debenture Guar.*, 921 F. Supp. 750, 756 (M.D. Fla. 1996).

Wells Fargo's other defense. As stated above, Plaintiffs likely do not have a contractual relationship with Wells Fargo. *See* FAC ¶ 111. Even if Plaintiffs and Wells Fargo have a contractual relationship, claims regarding Wells Fargo's kickback scheme are not governed by the mortgage, and therefore, are not barred by the economic loss doctrine. *See Shein v. Canon U.S.A., Inc.*, 2009 WL 1774287 (C.D. Cal. June 22, 2009) ("at this juncture, dismissal is inappropriate, because plaintiffs' allegations may properly be read as alleging a tortious act separate from any breach of contract claim alleged.")

**E. Wells Fargo Breached Its Fiduciary Duty to Plaintiffs**

Wells Fargo breached its fiduciary duty to Plaintiffs when it force-placed flood insurance at exorbitant costs so that it could receive undisclosed kickbacks. "The elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach." *Knox v. Dean*, 205 Cal. App. 4th 417, 432 (2012).<sup>12</sup> "The key factor in the existence of a fiduciary relationship lies in control by a person over the property of another." *In re Bank of New York Mellon Corp. False Claims Act Foreign Exch. Litig.*, 851 F. Supp. 2d 1190, 1200 (N.D. Cal. 2012)(quoting *Vai v. Bank of Am.*, 56 Cal.2d 329, 338 (1961)). While a lender-creditor relationship generally does not give rise to a fiduciary duty, a fiduciary duty may exist "when the lender is in a fiduciary position of trust and not simply a mere lender." *Pension Trust Fund for Operating Eng'rs v. Fed. Ins. Co.*, 307 F.3d 944, 954 (9th Cir. 2002)(citing *Kovich v. Paseo Del Mar Homeowners' Ass'n*, 41 Cal. App. 4th 863, 866 (1996)).<sup>13</sup> "The determination of what constitutes a confidential or fiduciary relationship is a question of fact." *Lowery v. Guar. Bank and Trust Co.*, 592 So.2d 79, 85 (Miss. 1991).

<sup>12</sup> Florida follows this same approach. *See Gracey v. Eaker*, 837 So.2d 348, 353 (Fla. 2002).

<sup>13</sup> Florida Courts have found fiduciary relationships where "the lender 1) takes on extra services for a customer, 2) receives any greater economic benefit than from a typical transaction, or 3) exercises extensive control," and where "the bank knows or has reason to know that the customer is placing his trust and confidence in the bank and is relying on the bank so to counsel and inform him." *Capital Bank v. MVB, Inc.*, 644 So.2d 515, 519 (Fla. 3d Dist. Ct. App. 1994).

A fiduciary relationship may arise in connection with administration of an escrow account used for force-placed insurance. The Middle District of Florida in *Gordon, supra*, denied a motion to dismiss an identical claim, holding that the bank “received a greater economic benefit from the typical mortgage transactions in the form of ‘kickbacks.’” *Id.* at \*5; *see also, Vician v. Wells Fargo Home Mortg.*, 2006 WL 694740 (N.D. Ind. Mar. 16, 2006)(Wells Fargo owed a fiduciary duty to its borrower when it charged “excessive force-placed insurance premiums and finance charges to Plaintiffs’ escrow account”); *Am. Bankers Ins. Co. of Fla. v. Alexander*, 818 So.2d 1073, 1085 (Miss. 2001)(bank “owed a fiduciary duty . . . to inform the plaintiffs of the nature of the profit sharing scheme between [the bank and its affiliate]” in a force-placed insurance scenario)(overruled on other grounds). This Court should follow these cases.

Dismissal of Plaintiffs’ fiduciary duty claim is inappropriate at this stage of litigation. Defendants required that Plaintiffs open an escrow account to ensure that Plaintiffs’ property was insured to the extent necessary to “cover Lender,” but charged Plaintiffs for force-placed insurance over the amount necessary to do so. FAC 123–24. Wells Fargo owed a fiduciary duty to Plaintiffs here because it took on extra services (providing force-placed insurance), earned a greater economic profit (kickbacks), and knew that Plaintiffs were the substantially weaker party and likely relied on its assessment of flood insurance requirements. Defendants owed—and violated—this fiduciary duty when they engaged in self-dealing and devising a scheme to receive kickbacks for force-placed insurance without disclosing the nature of this scheme. *See Am. Bankers*, 818 So.2d at 1085.<sup>14</sup>

#### **F. Wells Fargo Violated TILA**

The fundamental purpose of the Truth in Lending Act (TILA), 15 U.S.C. §§ 1601, *et seq.*, is to provide borrowers with clear and accurate disclosures of loan terms. *Beach v. Ocwen Fed. Bank*,

<sup>14</sup> Wells Fargo also argues that the economic loss doctrine bars Plaintiffs’ fiduciary duty claim. Again, Plaintiffs are not even sure that a contract governs their relationship with Wells Fargo and Wells Fargo’s kickback scheme is not governed by any express contract anyways.

523 U.S. 410, 412 (1998); 12 C.F.R. § 226.17(c). With respect to residential mortgages, TILA aims “to assure that consumers are offered and receive residential mortgage loans on terms . . . that are understandable and not unfair, deceptive, or abusive.” 15 U.S.C. § 1639b(a)(2). “As a remedial statute, TILA must be construed liberally in favor of the consumer.” *Bragg v. Bill Heard Chevrolet, Inc.*, 374 F.3d 1060, 1065 (11th Cir. 2004). Additionally, “a creditor may not change the terms of the extension of credit if such changes make the disclosures inaccurate, unless new disclosures are provided . . . .” 15 U.S.C. § 1639(a)(2)(A).

Numerous courts have upheld TILA claims based on excessive and improper flood and hazard insurance claims. The first case of this nature was *Hofstetter*, which certified a national TILA class of HELOC borrowers before the parties reached a settlement. 751 F. Supp. 2d 1116. Since *Hofstetter*, numerous other courts have followed suit in both excess insurance and force-placed insurance cases. *See, e.g., Wulf*, 798 F. Supp. 2d 586; *Gooden, supra*; *Morris, supra*. This Court should do the same.

Wells Fargo violated TILA when it (1) failed to clearly, fully, and accurately disclose its flood insurance requirements in its mortgages; (2) failed to correct the disclosures contained in Plaintiffs’ mortgage when the prior disclosures clearly differ from Wells Fargo’s requirements; and (3) failed to disclose the nature and amount of the kickback that it would receive for the purchase of force-placed flood insurance. FAC ¶ 126–37. Plaintiffs’ mortgage and the attached NSFH require flood insurance equal to the borrower’s outstanding loan balance. *See* Mortgage ¶ 5; NSFH. As the First Circuit held in *Lass, supra*, the NSFH specified that Plaintiffs were “obliged to obtain the amount of flood insurance required by federal law, and no more.” *Id.* at \*4. The NSFH is clearly inaccurate in light of Wells Fargo’s requirement that borrowers maintain flood insurance equal to replacement cost value. FAC ¶ 129. Wells Fargo never corrected these inaccurate disclosures. FAC ¶ 132.

Lenders must “provide material disclosures to borrowers, including the finance charges

1 associated with the loan.” *Wulf*, 798 F. Supp. 2d 586; *see also*, 12 C.F.R. §§ 226.4, 226.18.  
 2 “Premiums or other charges for insurance against loss of or damage to property . . . written in  
 3 connection with a credit transaction” are considered part of the finance charge that must be disclosed.  
 4 12 C.F.R. § 226.4(b)(8). Wells Fargo incorrectly argues that “TILA does not require any disclosure  
 5 regarding insurance that the borrower may or must buy on his own.” Mot. to Dismiss 23. “[S]everal  
 6 courts have concluded that a charge for insurance not authorized by the loan documentation  
 7 constitutes a finance charge and requires disclosure.” *Wulf*, 798 F. Supp. 2d at 598–99 (citing  
 8 *Hofstetter*, 751 F. Supp. 2d 1116; *Travis v. Boulevard Bank, N.A.*, 880 F. Supp. 1226 (N.D. Ill. 1995);  
 9 *Bermudez v. First Am. Bank Champion, N.A.*, 860 F. Supp. 580 (N.D. Ill. 1994)). Just last month, the  
 10 Western District of Pennsylvania followed this line of cases and denied a motion to dismiss similar  
 11 TILA claims. *Morris*, *supra* at \*14.

12 Although TILA “does not apply to insurance purchased from a third party insurer . . . , TILA  
 13 does apply to insurance allegedly force placed on Plaintiff’s property.” *Gooden*, *supra*, at \*4. “The  
 14 law treats force placed insurance coverage that exceeds that required in the loan agreement  
 15 differently.” *Id.* at \*5. The Western District of Pennsylvania described the situation as follows:

16 In that event, the insurance is no longer exempt from disclosure as part of the finance  
 17 charge under 12 C.F.R. § 226.4(d)(2)(i) and must be disclosed in accordance with 12  
 18 C.F.R. § 226.4(d)(2)(ii). In turn, the finance charge has changed, as has the total  
 19 amount of indebtedness where the mortgagor is charged for the insurance under the  
 20 purported terms of the mortgage. New and additional credit is extended with the  
 21 premium is charged to the mortgagor. It is this change of events that constitutes a  
 22 “new” transaction under the TILA, *see* 12 C.F.R. § 226.18 . . . , and requires new  
 23 disclosures to account for the new finance charge . . . , the amount financed . . . , and  
 24 the new insurance requirements.

25 *Morris*, *supra*. Allegations that a “Defendant force placed unauthorized . . . insurance on Plaintiff’s  
 26 property, exceeding the amount required by the loan agreement and which required accurate and  
 27 meaningful disclosures as well as changes to the policy’s requirements . . . entitle Plaintiff to relief  
 28

1 under TILA.” *Gooden, supra* (citing *Hofstetter*, 751 F. Supp. 2d at 1126–27).

2 Wells Fargo changed the terms of Plaintiffs’ loan, thus creating a new loan obligation, when it  
3 added force-placed insurance premiums to Plaintiffs’ outstanding loan balance. FAC ¶ 132; *see also*,  
4 *Morris, supra*. “[F]orce-placed coverage that exceeds the coverage required by the NFIA and  
5 mortgage agreement ‘is an impermissible change of terms in violation of TILA.’” *Gooden, supra*, at  
6 \*7 (internal citation omitted). In *Hofstetter*, the Northern District of California held that the defendant  
7 violated TILA by changing the terms of borrowers’ loans when it increased its flood insurance  
8 requirements several years after consummation of the plaintiffs’ loans without providing new  
9 disclosures. 751 F. Supp. 2d at 1128; *see also, Morris, supra* (following *Hofstetter*). “The sound  
10 reasoning in *Travis* and its progeny recognize as much and compel the denial of [Wells Fargo’s]  
11 motion to dismiss plaintiff’s TILA count.” *Morris, supra*. This Court should do the same.

14 Wells Fargo cannot rely on the original flood notice attached to Plaintiffs’ mortgage to satisfy  
15 TILA’s disclosure requirement. “TILA prohibits not only failures to disclose, but also false or  
16 misleading disclosures.” *Rossman v. Fleet Bank, N.A.*, 280 F.3d 384, 393 (3d Cir. 2002). In  
17 *Hofstetter*, 751 F. Supp. 2d 1116,<sup>15</sup> the Northern District of California, addressing the same mortgage  
18 provision at issue here, held that the bank violated TILA by requiring that a borrower maintain flood  
19 insurance in excess of outstanding loan balance, because federal law and the mortgage only required  
20 loan balance coverage. *Id.* The Eastern District of Pennsylvania held the same in *Wulf*, 798 F. Supp.  
21 2d 586 (citing 12 C.F.R. § 226.4(b)(8)). Both *Hofstetter* and *Wulf* held that TILA required new  
22 notices because original notices became misleading due to the banks’ new insurance requirements.

24 Wells Fargo attempts to place blame on Plaintiffs, stating that “[n]o new TILA disclosures are  
25

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26 <sup>15</sup> Although *Hofstetter* addressed home equity lines of credit, the distinction is irrelevant. The Eastern District of  
27 Pennsylvania in *Wulf*, addressing traditional mortgage loans, held that the court’s reasoning applied to all TILA claims.  
28 *Wulf*, 798 F.Supp.2d at 599; *see also, Gooden, supra*, at \*4–5; *Morris, supra* (disagreeing with the argument that  
*Hofstetter* is distinguishable because it was based on TILA’s provisions governing HELOCs).

1 required when a creditor adds charges to a loan balance as a result of the borrower's default." Mot. to  
 2 Dismiss 22. The court in *Wulf*, addressing this same argument, held that "it is plausible that the  
 3 inaccuracy of the original disclosures was caused by Defendants' departure from the mortgage  
 4 documentation." 798 F. Supp. 2d at 599. The Northern District of Illinois has also rejected this  
 5 argument, finding that "the post-consummation inaccuracy was 'the result of Defendant's departure  
 6 from the contract.'" *Travis*, 880 F. Supp. 2d at 1230.

8 This Court should follow the line of cases addressing this issue and deny Wells Fargo's  
 9 Motion to Dismiss Plaintiffs' TILA claim. *See, e.g., Morris, supra*. TILA's underlying purpose is "to  
 10 assure meaningful disclosure of credit terms," 15 U.S.C. § 1601(a). "As a remedial statute, TILA  
 11 must be construed liberally in favor of the consumer." *Bragg*, 374 F.3d at 1065.

#### 13 **G. Wells Fargo Violated the California Unfair Competition Law**

14 The purpose of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §  
 15 17200 *et seq.*, is to protect both consumers and competitors by promoting fair competition in  
 16 commercial markets for goods and services. *Kasky v. Nike*, 27 Cal. 4th 939, 949 (2002). Its main  
 17 purpose is consumer protection. *Barquis v. Merchants Collection Ass'n*, 7 Cal. 3d 94, 111 (1972). A  
 18 plaintiff may state a cause of action under the UCL by establishing that a particular business practice  
 19 is "unlawful" or "unfair." *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.* 20 Cal.4th 163,  
 20 180 (1999). Wells Fargo's force-placed insurance practices violated the UCL's prohibition of both  
 21 "unlawful" and "unfair" business acts or practices. This District recently upheld UCL claims alleging  
 22 identical practices by JPMorgan Chase Bank in *McNeary-Calloway, supra*.

23  
 24 Wells Fargo's conduct is unlawful under several federal and state law statutes, as well as  
 25 common law. FAC ¶ 139. The UCL's "coverage is 'sweeping, embracing anything that can properly  
 26 be called a business practice and that at the same time is forbidden by law.'" *Rubin v. Green*, 4 Cal.  
 27  
 28

4th 1187, 1200 (1993)(quoting *Barquis*, 7 Cal. 3d at 113). “[T]o maintain a claim under the UCL based on unlawful conduct, a plaintiff must allege facts sufficient to establish violation of some law.” *McNeary-Calloway*, *supra*, at \*28. As discussed above, Plaintiffs have stated numerous legal theories under which Wells Fargo may be held liable.

Wells Fargo is also liable under the “unfair” prong of the UCL. The Northern District of California has adopted a three-prong test for determining unfairness under the UCL: “(1) a substantial consumer injury; (2) the injury outweighs any countervailing benefits to consumers or competition; and (3) the injury could reasonably been avoided.” *Kilgore v. KeyBank, N.A.*, 712 F. Supp. 2d 939, 951–52 (2010). Fannie Mae’s force-placed insurance practices, executed through Wells Fargo, caused substantial injury to consumers and consequently provided virtually no benefit to consumers. The Northern District of California, in *McNeary-Calloway*, addressing a nearly identical UCL claim based on identical practices employed by JPMorgan Chase Bank with respect to force-placed hazard insurance, held that the plaintiffs alleged sufficient facts establishing a substantial injury to consumers that outweighed any perceived utility, because

Plaintiffs allege that Defendants unfairly force-place exorbitantly priced hazard insurance on their property and backdated the policy despite no damage to the property or claims arising out of the property during the backdated period. This practice was disadvantageous to Plaintiffs and unsupported by any apparent reason other than the fact that Defendants stood to benefit financially from the high-priced backdated policy. Moreover, Defendants arrangement with ASIC resulted in financial gains to Defendants at Plaintiffs’ expense, and created incentives for Defendants to seek policies with the highest premiums.

*McNeary-Calloway*, *supra*, at \*29. Plaintiffs here allege similar claims. FAC ¶¶ 46–62. The utility, if any, of these business practices is substantially outweighed by the harm caused to borrowers by such conduct. *See McNeary-Calloway*, *supra*. This Court should follow the decision rendered in this same District just this year and deny Wells Fargo’s Motion to Dismiss Plaintiffs’ UCL claim.

Wells Fargo argues only that Plaintiffs cannot avail themselves of the protection of the

California UCL. *See* Mot. to Dismiss 24. This is incorrect for reasons stated above in Section II(a)(2). Wells Fargo maintains its principal office in San Francisco, California. FAC ¶ 14, 17. Additionally, Plaintiffs have raised national and state law class action allegations, including claims on behalf of California residents. *See, e.g.*, FAC ¶ 74. As such, these business practices are subject to the laws of the State of California, including the UCL.

#### H. Wells Fargo Violated RESPA

Wells Fargo violated the Real Estate Settlement Procedures Act (“RESPA”), 12 U.S.C. § 2607(a), when it accepted kickbacks from Assurant in connection with force-placed flood insurance. RESPA is a remedial consumer protection statute and as such is to be construed liberally. *Rawlings v. Dovenmuehle Mortg., Inc.*, 64 F. Supp. 2d 1156, 1165 (M.D. Ala. 1999). “The primary ill that § 2607 is designed to remedy is the potential for ‘unnecessarily high settlement charges,’ caused by kickbacks, fee-splitting, and other practices that suppress price competition for settlement services.” *Jensen v. Quality Loan Serv. Corp.*, 702 F. Supp. 2d 1183, 1195 (E.D. Cal. 2010)(quoting 12 U.S.C. § 2601 (a)). Wells Fargo and Assurant entered into a secret arrangement, whereby all force-placed insurance policies were purchased for all Wells Fargo borrowers from Assurant, and Assurant paid and Wells Fargo received a kickback equal to a set portion of each premium. This is exactly the type of “unnecessarily high settlement charges” and “practices that suppress price competition” that RESPA seeks to prevent.<sup>16</sup>

RESPA § 2607(a)(2) provides that “[n]o person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.” Settlement services include “any service provided in

<sup>16</sup> Plaintiffs acknowledge that no court has allowed RESPA claims for post-origination force-placed insurance schemes. However, in light of the purpose of RESPA, Plaintiffs request that this Court allow the RESPA claim to proceed.

1 connection with a prospective or actual settlement, including . . . [p]rovision of services involving  
 2 hazard, flood, or other casualty insurance.” 24 C.F.R. § 3500.2. Wells Fargo performed no services in  
 3 connection with the purchase of Plaintiffs’ force-placed flood insurance. FAC ¶ 150. Thus, Wells  
 4 Fargo violated RESPA when it charged Plaintiffs for force-placed insurance and accepted the so-  
 5 called commissions from Assurant.  
 6

7 Plaintiffs’ RESPA claim is timely because “the date of the occurrence of the violation” is less  
 8 than one year prior to the filing of the Complaint. “[The] ill occurs, if at all, when the plaintiff pays  
 9 for the [tainted] service.” *Jensen*, 702 F. Supp. 2d at 1195 (quoting *Snow v. First Am. Title Ins., Co.*,  
 10 332 F.3d 356, 359–60 (5th Cir. 2003))(alterations in original). Wells Fargo added force-placed  
 11 insurance premiums to Plaintiffs’ mortgage balance beginning in May 2008 and continuing until  
 12 November 2011. On November 23, 2011, concurrently with the filing of a complaint of foreclosure,  
 13 Defendants included \$7,811.27 as “escrow advances.” FAC ¶ 148. Thus, the “date of the occurrence  
 14 of the violation” is within the one year statute of limitations.  
 15

#### 16 **I. Plaintiffs Are Entitled to Equitable Relief**

17 Plaintiffs’ mistakenly listed “Equitable Relief” as a cause of action in their FAC. Plaintiffs are  
 18 aware, and agree with Defendants, that equitable relief is not a separate cause of action, but is,  
 19 instead, a remedy. In looking at the substance of Plaintiffs’ FAC, it is clear that Plaintiffs include  
 20 Equitable Relief at the end of their complaint as a form of remedy for the wrongs alleged in the  
 21 previous sections of the complaint addressing individual causes of action.  
 22

#### 23 **J. The Filed Rate Doctrine Is Inapplicable to Plaintiffs’ Claims**

24 The filed rate doctrine does not apply to Plaintiffs’ claims because Plaintiffs’ claims challenge  
 25 Defendants’ manipulation of the force-placed insurance market, not the filed premium rates  
 26 themselves. Florida’s regulation of insurance premiums and the filed rate doctrine do not apply to  
 27  
 28

1 mortgage servicers' exclusive purchase arrangements and kickback agreements with force-placed  
 2 insurance providers. "[T]he filed rate doctrine recognizes that where a legislature has established a  
 3 scheme for utility rate-making, the rights of the rate-payer in regard to the rate he pays are defined by  
 4 that scheme." *Taffet v. Southern Co.*, 967 F.2d 1483, 1490 (11th Cir. 1992). "[A]ny 'filed rate'—that  
 5 is, one approved by the governing regulatory agency—is per se reasonable and unassailable in  
 6 judicial proceedings brought by ratepayers." *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 19 (2d Cir.  
 7 1994). In *Abels*, 678 F. Supp. 2d 1273, the Southern District of Florida denied the argument that the  
 8 filed rate doctrine precluded the plaintiff's claims, reasoning that applying the filed rate doctrine to a  
 9 bank, which is "not subject to the extensive administrative oversight that insurance companies are[,]"  
 10 would not serve the twin goals of the filed rate doctrine (preserving the insurance regulator's  
 11 authority to determine premiums' reasonableness and insuring that insurance companies charge only  
 12 approved rates). *Id.* at 1277. In sum, the court held:

15 Plaintiffs are not complaining that they were charged an excessive insurance rate, *they*  
 16 *are complaining that the defendant bank acted unlawfully when it chose this*  
 17 *particular insurance company and this particular rate.* Indeed, the Supreme Court has  
 18 emphasized the limited scope of the filed rate doctrine to preclude damage claims only  
 19 where there are valid filed rates . . . Accordingly, the filed rate doctrine does not bar  
 20 Plaintiffs' case.

21 *Id.* (internal citations and quotations omitted and emphasis added).

22 More recently, the Southern District of Florida has denied two separate filed rate doctrine  
 23 defenses brought by Wells Fargo under identical facts. In *Kunzelmann*, *supra*, the Court ruled that  
 24 "Plaintiff's claims are not barred by the filed rate doctrine because he is not challenging the rates  
 25 filed by Defendants' insurers. Rather, Plaintiff challenges the manner in which Defendants select  
 26 insurers, the manipulation of the force-placed insurance process, and the impermissible kickbacks  
 27 that were included in the premiums." *Id.*; *see also*, *Williams*, *supra*, at \*11 n.7 ("Plaintiffs are not  
 28 merely challenging the imposition of the force-placed premiums or the amounts of those premiums.

1 Instead, they challenge the manipulation of the force-placed insurance process in general, the  
 2 payment arrangement between Wells Fargo Bank and the other Defendants, and Wells Fargo's  
 3 participation in the overall scheme intended to provide illegal kickbacks and commissions . . . [H]ere,  
 4 Wells Fargo Bank is alleged to have colluded with other entities in bad faith . . . .")

5  
 6 Plaintiffs do not challenge the rates that ASIC filed with the Office of Insurance Regulation.  
 7 Plaintiffs instead allege that that these "charges" were inflated because Wells Fargo manipulated the  
 8 force-placed insurance process so that it could receive an unearned kickback from ASIC for each  
 9 force-placed policy. As in *Abels*, *Kunzelmann*, and *Williams*, Plaintiffs allege that the bank engaged  
 10 in self-dealing when it chose an insurer that would provide kickbacks to the detriment of borrowers.  
 11 Such activity is not protected by the filed rate doctrine. *See Abels*, 678 F. Supp. 2d at 1277–78.<sup>17</sup>

12  
 13 **K. The National Bank Act Has No Preemptive Effect on Plaintiffs' State Law Claims**

14 Plaintiffs' state law claims are not preempted by the National Bank Act (NBA). The NBA  
 15 explicitly does not preempt the entire field of banking. 12 U.S.C. § 25b; *T.C. Jefferson v. Chase*  
 16 *Home Fin.*, 2008 WL 1883484, at \*7 (N.D. Cal. Apr. 29, 2008).<sup>18</sup> "Federally chartered banks are  
 17 subject to state laws of general application in their daily business to the extent such laws do not  
 18 conflict with the letter or general purposes of the NBA." *Watters v. Wachovia Bank*, 550 U.S. 1, 11  
 19 (2007)(citing *Davis v. Elmira Sav. Bank*, 161 U.S. 275 (1896)). "State consumer financial laws are  
 20 preempted only if" (1) application of the state law would have a discriminatory effect on national  
 21 banks compared to the effect on state-chartered banks; (2) state consumer financial law "prevents or  
 22

23  
 24 <sup>17</sup> Additionally, there is no evidence that Wells Fargo's kickbacks are even part of the insurance premiums that ASIC  
 25 filed with the Florida OIR. Although some portion of total charges that Wells Fargo forces borrowers to pay surely  
 26 derives from the filed premium rates, discovery has not revealed whether the kickbacks and other costs that Wells Fargo  
 includes in the charges it requires borrowers to pay are covered by force-placed insurance rates or added on by Wells  
 Fargo at the time it charges the borrowers.

27 <sup>18</sup> The only cases that Wells Fargo cites for its preemption argument relate to preemption under the Home Owners Loan  
 28 Act. However, "Courts have cautioned against wholesale application of an OTS/HOLA analysis in the OCC[NBA]  
 context" because "OTS preemption is more sweeping [than NBA preemption] because OTS occupies the entire field . . .  
 in connection with HOLA." *Davis v. Chase Bank U.S.A., N.A.*, 650 F. Supp. 2d 1073, 1083 (C.D. Cal. 2009).

significantly interferes with the exercise by the national bank of its powers;” or (3) state consumer financial law is preempted by some other provision of federal law. 12 U.S.C. § 25b.

Plaintiffs’ claims are not preempted because they raise state laws of general applicability that are not targeted at banking or “real estate lending” activities. Wells Fargo raised identical arguments in *Williams* and *Kunzelmann*. Both courts held that the NBA did not preempt state law claims. *See Williams, supra*, at \*9 (contract and unjust enrichment laws only incidentally affect the bank’s exercise of its powers); *Kunzelmann, supra*, at \*5 (contract and unjust enrichment claims are “laws of general application that are not directed at national banks or their activity or mandate what national banks can or cannot do” because plaintiff sought only the “recovery of the ‘inflated’ portions of the premiums, which Wells Fargo charged Plaintiff and the putative class in bad faith.”) Defendant does not even attempt to explain why this Court should reach a different result.

Wells Fargo incorrectly argues that Plaintiffs’ claims are preempted by OCC regulations codified at 12 C.F.R. §§ 7.4002 and 34.4. 12 C.F.R. § 7.4002 authorizes national banks to charge “non-interest charges and fees” related to “banking services.” ASIC’s insurance premiums are not “fees and charges” connected to any banking services. Hence, this regulation has no application here.<sup>19</sup> Wells Fargo also improperly relies on 12 C.F.R. § 34.4, which preempts certain state laws as they relate to real estate loans. However, the preemptive effect is limited to the moment a national bank makes a loan. (“[a] national bank may *make* real estate loans . . . without regard to state law limitations . . . .”)(emphasis added). Wells Fargo has not made any loan to Plaintiffs. Thus, it is unclear how this regulation applies here. Further, 12 C.F.R. § 34.4(b) explicitly excludes contract and tort claims from preemption. (“State laws on [contracts and torts] are not inconsistent with the real estate lending powers of national banks to the extent that they only incidentally affect the exercise of

<sup>19</sup> Moreover, 12 C.F.R. § 7.4002(b)(2) dictates only “[t]he *establishment* of non-interest charges and fees, their amounts, and the methods of calculating them.” (emphasis added). Plaintiffs do not challenge the amount of the insurance premium Wells Fargo charged them.

national banks' real estate lending powers.”)

Finally, it is entirely unclear whether Wells Fargo's actions involve any “banking activity” or “banking power” that would trigger the NBA. Plaintiffs borrowed the funds secured by their mortgage from Amerisave Mortgage Corporation, which subsequently transferred the loan to Fannie Mae. FAC ¶ 27. Wells Fargo only services the loan on behalf of Fannie Mae. FAC ¶¶ 22, 26, 33. Thus, the NBA likely has no application to this case.

**L. The Jury Trial Waiver Is Unenforceable**

Plaintiffs' mortgage contains a purported waiver of the right to a jury trial. Mortgage ¶ 25. To enforce a jury trial waiver, the plaintiff must knowingly, voluntarily, and intelligently waive his rights. *Allyn v. W. United Life Assur. Co.*, 347 F. Supp. 2d 1246, 1252 (M.D. Fla. 2004). Florida courts consider five factors in determining whether the waiver was knowing and voluntary: (1) the conspicuousness of the provision in the contract; (2) the level of sophistication and experience of the parties entering into the contract; (3) the opportunity to negotiate terms of the contract; (4) the relative bargaining power of each party; and (5) whether the waiving party was represented by counsel. *Id.* The Court must then consider whether, in light of the circumstances, the waiver was “unconscionable, contrary to public policy, or simply unfair.” *Id.* (citing *Gulati v. Countrywide Home Loans, Inc.*, 2006 WL 6300891, \*1–2 (M.D. Fla. Feb. 17, 2006)).

Any alleged waiver of Plaintiffs' constitutional right to a jury trial is invalid. Plaintiffs did not knowingly and voluntarily waive their constitutional right to a jury trial. The jury waiver provision is located at the end of the mortgage and it is not set apart from the other sections of the contract. Most importantly, Plaintiffs had no opportunity to negotiate the terms of their form mortgage contract. Plaintiffs' mortgage is a standard national Fannie Mae/Freddie Mac mortgage, and the contract terms were presented on a take-it-or-leave-it basis. The circumstances surrounding the purported waiver of

an important constitutional right cannot be considered knowing and voluntary.

Even if this Court finds that jury trial waiver valid, the Court should still deny Wells Fargo's Motion to Strike Plaintiffs' Jury Trial Demand as premature as to claims that do not arise out of the mortgage contract. *See Buckeye Ventures, Inc. v. Trafalgar Capital Specialized Investment Fund Luxembourg*, 2009 WL 2477470, \*6 (S.D. Fla. Aug. 11, 2009)(denying motion to strike jury trial based on contract waiver because claims outside the contract were not subject to the waiver).

### III. CONCLUSION

For the reasons stated, Wells Fargo Bank, N.A.'s motion to dismiss should be denied. If, however, this Court grants Wells Fargo's motion in whole or in part, Plaintiffs respectfully request leave to amend.

Dated: October 16, 2012

Respectfully submitted,

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